

## **The Federal Trust Responsibility**

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Indian nations and the United States government have a sovereign-to-sovereign relationship evidenced by treaties, agreements, acts of Congress, and court decisions. European nations that explored and came to what is now the United States asserted exclusive rights to deal with the indigenous nations in matters related to land and intergovernmental relations. This assertion of authority was largely designed to resolve competition between the European Nations, and could not affect the status of Indian nations as pre-existing sovereigns. When the United States Constitution was adopted, the federal government assumed exclusive authority in all matters related to Indian affairs. Nearly fifty years later, Supreme Court Chief Justice John Marshall stated that the “Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.” The Supreme Court in 2004 noted that “at least during the first century of America's national existence ... Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law.”

While the earliest treaties reflected a desire for mutual peace and intergovernmental respect, later treaties and agreements were geared to the United States' acquisition of land. In return, the United States provided compensation in various forms. Most important from the Indian perspective were the promises of permanent homelands, access to natural resources, and recognition of the right to continue to exist as distinct sovereign peoples. The Supreme Court noted that although the federal government and other had colonized the United States, the law of nations mandated that the Indian tribes were owed a duty of protection from incursions on tribal governmental authority and

independence within the newly formed nation. These rights were to be safeguarded, *and supported*, by the United States, especially from interference by the states. The government-to-government relationship and these promises of political allegiance remain at the foundation of the federal trust responsibility despite vacillating federal policies that resulted in removal, allotment of tribal lands, and the associated loss of approximately 90 million acres of tribal land by 1934.

As set out in the leading Indian law treatise, the COHEN HANDBOOK OF FEDERAL INDIAN LAW:

Understanding history is crucial to understanding doctrinal developments in the field of Indian law. For example, treaty-making with Indian tribes involved matters of immense scope: The transactions totaled more than two billion acres, and some individual treaties dealt with land concessions involving tens of millions of acres. At the same time, treaties included minutiae such as provision of scissors, sugar, needles, and hoes. Yet, out of the felt needs of the parties to the treaty negotiations there evolved comprehensive principles that have continued significance to this day. These include the sanctity of Indian title, the necessary preeminence of federal policy and action, the exclusion of state jurisdiction, the sovereign status of tribes, and the special trust relationship between Indian tribes and the United States. These principles endure beyond the four corners of negotiated treaties. When Congress ended treaty making in 1871, these principles lived on in the “treaty substitutes” that followed in the form of agreements, executive orders, and statutes. Thus, what is seemingly background becomes the foreground—indeed the basis-for contemporary judgments.

Although federal policies changed over time from the allotment and assimilation era to outright termination of the federal-tribal relationship, since 1970 the federal policy is one of Indian self-determination without termination. This modern policy is backstopped by the federal government's trust responsibility to Indian nations. President Nixon's 1970 address rejecting the forced termination policy described the nature of the federal-tribal relationship.

The policy of forced termination is wrong in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship for Indian communities as an act of generosity toward a disadvantaged people and that can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the federal government is the result of solemn obligations, which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services that would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans. The Supreme Court has concluded that the United States "has charged itself with moral obligations of the highest responsibility and trust." This general principle is

implemented through many federal statutes and programs that implement past promises and modern policy. These modern programs were developed largely in consultation with Indian tribes and are intended to promote economic self-sufficiency and the distinct sovereign status of Indian nations and their people. Specific obligations include the following:

- The Department of the Interior is responsible for managing 56 million surface acres and 57 million acres of subsurface mineral estates for 384,000 Individual Indian Money (IIM) accounts and about 2,900 tribal accounts (for more than 250 federally recognized tribes). Tribal trust assets include land, water, timber, oil, gas, and mineral resources.
- On trust lands, the Department manages more than 109,000 leases. For fiscal year 2011, funds from leases, use permits, land sales, royalties, settlements, and income from financial assets, totaling about \$400 million, were collected for about 384,000 open IIM accounts. In FY 2011, about \$609 million was collected for the approximately 2,900 tribal accounts. Collectively, the United States holds approximately \$3.9 billion in trust funds.
- There are currently 156,596 individual Indian land allotments, and one of the major challenges facing the administration with regard to these allotments is the increasing fractionation among individual owners of interests in the land. As of early 2012, there are over 4.7 million fractionated interests.
- There are 566 Indian tribes in Alaska and the lower 48 states that are acknowledged by the United States. Federal policy supports self-determination for these tribes in the exercise of authority over tribal territories and resources, and a wide variety of roles under many federal statutes and programs.
- The Self-Determination and Self-Governance Statutes provide a way for Indian tribes to assume management of many federal duties in order to better serve tribal communities.

At times in the past, the trust responsibility was viewed as a demeaning and paternalistic guardian-ward relationship. That model is unsuited for the modern self-determination era, but has not evolved as rapidly as the movement toward self-determination. Thus, the outmoded trust model still influences the performance of the

federal government's obligations to Indian nations and people in some cases. For example, many federal statutes require federal approval of the leasing of tribal and individual Indian lands for most purposes. The exercise of this authority can sometimes be cumbersome if not implemented in a timely fashion. The federal responsibilities, however, can serve the valuable function of assisting to ensure the appropriate financial return to tribal and individual Indians from the use of trust assets. While all of the recent Presidential administrations and several acts of Congress call for extensive consultation with Indian tribes and people in matters affecting Indian interests, there are many situations where Indian interests are not adequately considered and requests by individual Indian nations and individuals for action are not accepted. In some cases, this may be due to conflicting obligations imposed on the federal administration by Congress, or due to Supreme Court rulings that allow the United States to escape liability for alleged mismanagement of tribal trust resources. In some cases the United States is more concerned about protecting itself from future liability than in effectively executing its trust duties to Indian nations and people. Federal officials must establish clear protocols for disclosing and minimizing conflicts of interest, which should be implemented after full consultation with Indian nations. This must go beyond conflicts that meet minimal legal standards applicable to non-fiduciary relationships and extend to appearances of conflicts of interest that affect tribal and individual Indian interests in any transaction or actions related to trust assets, or the government-to-government relationship. It bears emphasizing that this problem was identified in 1970:

The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical

economic importance to the Indian people; frequently they are also the subject of extensive legal dispute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee.

Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists.

It is unacceptable to say that the United States Supreme Court has relaxed the extent of the federal government's liability to pay money damages in some cases, and that that line of cases reflects the United States' duties. Rather, the United States must reach a higher standard. One way to do that may be by resurrecting the concept of the Indian Trust

Counsel identified in 1970, or through adoption of administrative trust protocols like those appended to this document.

It is critical that the United States continue to acknowledge its historic legal and moral obligations to Indian nations to further the sovereign-to-sovereign relationship at the foundation of the many complex dealings that occur on a regular basis. It must be remembered that the United States would not exist but for the acquisition of tribal territories that were given in exchange for the continued support and respect of the federal government. The promises of permanent homelands and recognition of the right to continue to exist as distinct sovereign peoples impose solemn obligations on all branches of the federal government. Similarly, the United States must work diligently to fulfill the trust relationship initiated with individual Indians through the allotment process. How those responsibilities are best administered in particular contexts will be the topic of further work and recommendations by the Indian Trust Responsibility Reform Commission. The American Indian Policy Review Commission's chapter on the trust responsibility is attached as an appendix. Comments on the recommendations of that Report would be appreciated.

**Note:** This document will be revised after review of the statements and testimony presented to the Commission at its meeting in late April.